Trinity Transportation Corp. *and* Local 813, International Brotherhood of Teamsters, AFL–CIO and Local 835, Sanitation Workers, International Brotherhood of Industrial Workers, Party-in-Interest. Case 29–CA–18628

June 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 12, 1997, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent and the Party-in-Interest filed exceptions and supporting briefs, and the General Counsel filed exceptions and a brief in support of exceptions and the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to modify the remedy,[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Trinity Transportation Corp., Central Islip, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Reimburse present and former unit employees, with interest, for all dues and fees that they paid to the Union as required by the contract dated May 23, 1994, and any extensions or modifications to that agreement.

2. Substitute the following for paragraphs 2(c) and (d).

"(c) Within 14 days after service by the Region, post at its facility in Central Islip, New York, copies of the attached notice marked 'Appendix.'[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 23, 1994.

"(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT recognize or deal with Local 835, Sanitation Workers, International Brotherhood of Industrial Workers as the bargaining representative of our workers unless and until the Union has been certified as the collective-bargaining representative of these employees by the National Labor Relations Board.

WE WILL NOT give effect to, or in any manner enforce, the contract entered into with the Union on May 23, 1994, or any renewals, extensions or modifications of the contract, unless and until the Union is certified

[1] The Respondent and the Union (Party-in-Interest) have excepted to some of the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Although the judge found that the Respondent violated Sec. 8(a)(2) and (1) of the Act by recognizing the Union at a time when the Union did not represent a majority of the unit employees, he inadvertently stated in his Conclusions of Law only that this conduct violated "Section 8(a)(1) of the Act." We correct this error.

[3] In requiring the Respondent to reimburse the unit employees for any union dues and fees that they paid the Union as required by the parties' collective-bargaining agreement, the judge failed to award interest on the amounts owed by the Respondent. Accordingly, we modify the judge's remedy to require that these monetary sums are to be computed with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See, e.g., *Caldor*, 319 NLRB 728, 739–740 (1995).

[4] We find merit in the General Counsel's exception to the judge's failure to include a paragraph in his notice requiring the Respondent to withdraw and withhold recognition from the Union as the unit employees' bargaining representative until such time as the Union receives Board certification as the representative of these employees. We therefore shall substitute a new notice, which includes this provision, in order to conform the notice with the judge's recommended Order. Additionally, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

by the Board as the exclusive representative of the employees; provided, however, that nothing stated here shall require us to vary any wage, hour, or other term or condition of employment which we have established in the performance of these agreements, or to prejudice the assertion by employees of any rights they may have acquired under them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold recognition from the Union as the collective-bargaining representative of its employees unless and until the Union is certified by the Board as the exclusive representative of these employees.

WE WILL reimburse, with interest, our present and former employees for all dues and fees that they paid to the Union as required by the parties' collective-bargaining agreement dated May 23, 1994, and any extensions or modifications to that agreement.

TRINITY TRANSPORTATION CORP.

Saundra Rattner, Esq., for the General Counsel.
William H. Englander, Esq., for the Respondent.
Richard Brook, Esq. (Cohen, Weiss & Simon), for the Charging Party.
Robert M. Ziskin, Esq., for Local 835.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 8, 1997, in Brooklyn, New York. The complaint, which issued on January 19, 1995, and was based on an unfair labor practice charge that was filed on October 17, 1994,[1] by Local 813, International Brotherhood of Teamsters, AFL–CIO (the Teamsters) alleges that Trinity Transportation Corp. (the Respondent) violated Section 8(a)(1) and (2) of the Act on about May 23, by recognizing and subsequently entering into and maintaining a collective-bargaining agreement with Local 835, Sanitation Workers, International Brotherhood of Industrial Workers (the Union), which agreement requires Respondent's employees to become and remain members of the Union, as well as containing a provision requiring Respondent to deduct dues and fees on behalf of the Union for employees who have signed checkoff authorizations and to remit these dues and fees to the Union.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Unless indicated otherwise, all dates are in 1994.

II. LABOR ORGANIZATION STATUS

The Respondent and the Unions admit, and I find, that the Union and the Teamsters are each labor organizations within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

The complaint alleges that the Respondent violated Section 8(a)(1) and (2) of the Act by recognizing the Union and entering into a contract with the Union on about May 23 at times when the Union did not represent an uncoerced majority of its employees. The Respondent and the Union admit that the Respondent recognized, and entered into a contract with the Union at that time, but deny that the Union lacked majority status at the time. The case is therefore one of numbers, how many employees were in the unit at the time that the Respondent recognized the Union, and how many authorization cards the Union had obtained from the unit employees prior to that date. The sole witness here was Dominic Testa, who was a shareholder and president of Respondent at the time of the incidents, but who was no longer connected with the Respondent at the time of the hearing. While not the most cooperative or precise witness, I did not find him to be clearly incredible, especially since there were no witnesses to contradict his testimony.

Although Testa's testimony cannot be described as either thoughtful or consistent, overall, he testified that he was first approached for recognition by Greg Pepper, a union representative, on the morning of Friday, May 20. Counsel for the General Counsel moved into evidence the transcript of a representation hearing conducted in September; at this hearing, Testa testified that Pepper showed him the authorization cards "either the very beginning of May or right around there," which was "a week or two" before the contract was signed (May 23). They met on two or three occasions after that and executed the agreement "within a week or ten days." At the hearing Testa testified that although the Union's office is located a few blocks from Respondent's facility, he was not aware that his employees were signing authorization cards for the Union, nor had he ever previously met Pepper. Pepper showed him authorization cards signed by Ray Chapman, Mike Warner, Henry Gadomski, Mike Curtis, John Vinski, and one or two other cards. At the representation hearing in September, he testified that Pepper showed him six or seven authorization cards; at the hearing, he testified that he was shown seven or eight cards. He could not remember any other specific cards that he was shown by Pepper on that day. At the instant hearing, Testa testified that Pepper told him that he wanted to negotiate a contract with him covering Respondent's employees. Testa asked to see the cards, and after looking at them, he asked Pepper, "Where do we go from here, how do we negotiate a contract?" Pepper gave him a sample union contract and they discussed certain of the provisions. At the conclusion of that meeting, Testa told him: "Give me a chance to think about it a little bit; we'll get back together and come up with a final contract." Between that morning and Monday, May 23, when the contract was signed, he met Pepper on one or two occasions at Respondent's facility where they made some changes in the proposed contract before they finalized it.

The authorization cards produced at the hearing establish that Chapman's card was dated May 10, Curtis and Warner's

cards are dated May 20, Gadomski's card is dated May 13, and Vinski's card is dated April 1. The Union produced six additional authorization cards, one dated May 19 (Thomas Miliore), one, May 20 (Charles Moriarity), and the remaining four cards were either dated in June (Edward Quirk and Louis Deiosso), or were undated (Marcus Bello and Dennis Olff).

The Respondent produced its payroll for the week ending June 2 and the week ending September 15. The payroll for the week ending June 2 lists the following employees, with the exception of Testa: Bello, Chapman, Curtis, Deiosso, Frank Farr, Gadomski, Olander Hunter (hired on May 13), Miliore, Moriarity, Dennis Olff (with a hire date of May 21), Steven Pusarik (with a hire date of May 24), Quirk, Vinski, and Warner.

Counsel for the General Counsel alleges that Gadomski is a supervisor within the meaning of Section 2(11) of the Act. Initially, counsel for the General Counsel was relying on a Decision and Order issued by the Regional Director for Region 29 on June 8, 1995, in Cases 29–UC–423 and 29–UC–425. In this decision, the Regional Director found, inter alia, that the Respondent's employees did not constitute an accretion to two existing units. Footnote 8 states: "It appears from the record that [Gadomski] is a Section 2(11) supervisor because he effectively recommends hiring, schedules work and responsibly directs employees." The Respondent did not file any exceptions to this decision. Counsel for the General Counsel made this decision a part of the formal papers herein because, "Certain findings in the R case are binding on the related C cases and there is one specific finding in the R case that we want for the C case . . . the specific fact in it, the UC finds that Henry Gadomski is a statutory supervisor." I did not accept counsel for the General Counsel's argument that the finding in the R case is binding on me. This was a Regional Director's decision affirming the findings of a hearing officer. It was never appealed by the Respondent because the Respondent "won" that case in that the Regional Director agreed with its argument that its employees were not accreted into the unit. I therefore invited counsel for the General Counsel to establish Gadomski's supervisory status through record testimony.

The record testimony herein consists of counsel for the General Counsel's examination of Testa, together with the transcript of the R case hearing from September 29. In the instant matter, Testa testified that in May, Gadomski was a driver for the Respondent and became a supervisor "probably right before September." At one point in the transcript of the R case, Testa testified: "I have someone helping me now with some supervisory matters. His name is Henry Gadomski." A few moments later in that hearing he testified that he and Gadomski schedule the loads for Respondent's customers:

> When we get back to the office in the afternoon, we would get that information to our drivers either by beeping them or calling them on their car phones . . . We would tell them where to pick their loads up. That information would either come from Danielle, who is in our office relaying the message from either [Gadomski] or myself.

At the hearing, Testa testified that in May Gadomski was a driver and was paid a driver's wage; "when he was doing supervisory work, he got more money." Respondent's payroll records establish that Gadomski's hourly wage rate was $18.50 on both June 2 and September 15. Chapman and Warner were also paid $18.50 an hour by Respondent; the other employees were paid about $15 an hour.

This is a "bare bones" type of case with limited testimony and evidence. Beginning with counsel for the General Counsel's allegation that Gadomski is a supervisor within the meaning of Section 2(11) of the Act, I find that counsel for the General Counsel has not sustained her burden of establishing Gadomski's supervisory status on May 23. All that she has established is Testa's conclusion that Gadomski became a "supervisor" in about September and that he was paid more than all but two of Respondent's employees. She has failed to establish that on May 23, Gadomski exercised any of the supervisory powers specified in Section 2(11) of the Act. I therefore find that Gadomski was not a supervisor within the meaning of the Act on May 23.

There is a clear and crucial conflict between the testimony of Testa in September and his testimony here. In the R case hearing, he testified that Pepper showed him the authorization cards and asked for recognition at about the very beginning of May, about a week or two prior to May 23. At the hearing, he testified that Pepper first approached him on Friday, May 20. Because Testa's testimony in the R case hearing was only a few months after the events occurred, and because the issue of the request for recognition was not as crucial as it is here, I credit his earlier testimony. Additionally, I can draw an adverse inference from the fact that the Union did not call Pepper, the only other individual with firsthand knowledge of the date of the request for recognition, as a witness.

Based on the above-credited testimony, I find that the Respondent recognized the Union on about May 10. The payroll information supplied by the Respondent establishes that the following employees were in the appropriate unit on May 10: Bello, Chapman, Curtis, Deiosso, Farr, Gadomski, Miliore, Moriarity, Quirk, Vinski, and Warner, for a total of 11 employees. Although Testa testified that Pepper showed him seven or eight union authorization cards, this testimony is not supported by the record, which establishes that of these 11 employees, only Chapman (May 10) and Vinski (April 1) signed authorization cards. Even if Bello's undated card was counted, the Union would still lack majority status on about May 10. I therefore find that the Respondent recognized the Union at a time when the Union did not represent a majority of its unit employees, thereby violating Section 8(a)(2) and 1 of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and Teamsters are each labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing the Union on about May 10, 1994, at a time when the Union did not represent a majority of its employees in an appropriate unit, the Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has violated the Act as alleged, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent be ordered to cease and desist from recognizing or dealing with the Union as the bargaining representative of its employees unless and until the Union is certified by the Board as the exclusive representative of these employees, and that Respondent cease giving effect to any collective-bargaining agreement with the Union, although nothing here shall be construed as requiring variance in any wage, hour, or other term or condition of employment which Respondent has established in the performance of these agreements, or to prejudice the assertion by employees of any rights they may have acquired thereunder. Finally, I shall recommend that Respondent reimburse the employees for any dues or fees they paid the Union as required by the contract between the Respondent and the Union.

On these findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended[2]

ORDER

The Respondent, Trinity Transportation Corp., Central Islip, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing or bargaining with the Union as the collective-bargaining representative of its employees unless and until the Union is certified by the Board as the collective-bargaining representative of the employees.

(b) Giving effect to the collective-bargaining agreement dated May 23, 1994, or any extension or modification of that agreement.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights as guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold recognition from the Union as the collective-bargaining representative of its employees unless and until the Union is certified by the Board as the representative of these employees.

(b) Reimburse the employees for all dues and fees that they paid to the Union pursuant to the contract dated May 23, 1994, and any extensions or modifications thereof.

(c) Post at its office copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being duly signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."